STATE OF MICHIGAN

COURT OF APPEALS

KORN FAMILY LIMITED PARTNERSHIP, GALE KORN, SHELDON KORN, SHAUNA KORN, and ASHLEY KORN,

Plaintiffs/Counter-Defendants-Appellants,

v

HARBOR BUILDING COMPANY, L.L.C., DISCOUNT HOMES, L.L.C., NORTHERN EXCAVATING, GRADING & SEPTIC, L.L.C., ABINGTON DEVELOPMENT COMPANY, L.L.C., BRIDESTONE DEVELOPMENT COMPANY, L.L.C., CLARITA COMMONS DEVELOPMENT COMPANY, L.L.C., and LAWRENCE LENCHNER,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
January 29, 2008

No. 272813
Charlevoix Circuit Court
LC No. 03-172319-CB

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal by right a judgment entered after jury verdicts in defendants' favor for silent fraud in the amount of $1,070,000, for fraud and misrepresentation in the amount of $250,000, and also $250,000 as exemplary damages. Plaintiffs also appeal the jury verdict of $250,000 against Sheldon Korn and Gale Korn for breach of fiduciary duty.[1] We affirm.

This litigation resulted when Lawrence Lenchner ended his business relationship with his brother-in-law Sheldon Korn. Both Sheldon[2] and Lenchner had backgrounds in residential construction and real estate development. They began working together in real estate

[1] Plaintiffs do not contest the jury's award of $175,000 for unjust enrichment.

[2] To avoid confusion individual plaintiffs are referred to by first name.

development in 1995 or 1996. According to Lenchner's theory of the case, although he and Sheldon were supposed to be partners, Sheldon never made any capital contributions or assumed any liability for any debts of the defendant business entities that Lenchner solely formed to conduct real estate development. The other plaintiffs in this litigation are Sheldon's wife, Gale, two daughters, Shauna and Ashley, and the Korn Family Limited Partnership (KFLP). The family partnership was apparently formed to evade the collection efforts of judgment creditors from an earlier unrelated lawsuit. See *Nationsbanc Mortgage Corp of Ga v Luptak*, 243 Mich App 560; 625 NW2d 385 (2001). Lenchner ended his association with the Korns on December 31, 2002.

The Korns and KFLP initiated this litigation on January 15, 2003, by filing suit against Lenchner and the real estate development companies he had formed. Plaintiffs third amended complaint alleged the following theories: (a) money owed on unpaid loans to the companies; (b) conversion; (c) statutory liability (treble damages) under MCL 600.2919a for receiving and concealing stolen or embezzled property; (d) fraudulent or innocent misrepresentation; (e) silent fraud; (f) bad faith promises; (g) breach of fiduciary duty; (h) tortious interference with business relationships; (i) unlawful discharge violating public policy, or alternatively, violating the whistle blower's protection act; (j) civil conspiracy; and (k) breach of contract. Lenchner and his companies (hereafter, defendants) in essence claimed that the Korns looted the companies for their personal benefit, alleging in a counterclaim: (a) conversion; (b) civil conspiracy to commit conversion; (c) breach of fiduciary duty; (d) civil conspiracy to commit breach of fiduciary duty; (e) fraud; (f) silent fraud; (g) innocent misrepresentation; (h) conspiracy to commit fraud, silent fraud, and innocent misrepresentation; (i) promissory estoppel; (j) unjust enrichment; and (k) constructive trust.

After a thirteen-day trial, the jury rejected all the Korns claims and rendered verdicts in favor of defendants totaling $1,745,000 against all plaintiffs jointly and severally (with verdict forms naming each plaintiff and/or the other plaintiffs), and an additional $250,000 awarded against Sheldon Korn and/or Gale Korn in the amount of $250,000 for breach of fiduciary duty. Specifically, the jury rejected Sheldon and Gale Korn's claim of being Lenchner's fifty-percent partners in the various business real estate development entities. The jury also rejected all of plaintiffs' legal theories for damages. On defendants' counterclaims, the jury found in favor of defendants, awarding damages against all plaintiffs of $175,000 for unjust enrichment, $1,070,000 for silent fraud, $250,000 for fraud & misrepresentation, and $250,000 as exemplary damages. The trial court entered judgment on July 28, 2006, against KFLP and/or each individual plaintiff for $1,745,000 and against Sheldon Korn and/or Gale Korn for an additional $250,000; each award also included interest from the date of filing the counter-complaint. The trial court subsequently denied plaintiffs' motion for judgment notwithstanding the verdict (JNOV), remittitur, or new trial. Plaintiffs appeal by right the judgment and the order denying post trial relief.

I

Plaintiffs first argue that the trial court erred by denying their motions for directed verdict and JNOV regarding defendants' claims of (A) fraud and (B) silent fraud. We disagree. We find defendants' legal theories that all plaintiffs are liable for fraud and silent fraud sound and supported by evidence, which if viewed in the light most favorable to defendants, supports the

jury verdicts. Plaintiffs' legal arguments to the contrary fail. Consequently, the trial court did not err in denying plaintiffs' motions for directed verdict and JNOV.

This Court reviews de novo a trial court's decision on both a motion for directed verdict and a motion for JNOV. *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2005). When reviewing the trial court's decision on a motion for a directed verdict, we must view the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party to determine whether a fact question existed. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006).

Similarly, a motion for JNOV should be granted only when there was insufficient evidence presented to create an issue of fact for the jury. *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). The trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id*. at 123-124. If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Foreman, supra* at 136.

A

As a general rule, actionable common-law fraud requires proof that: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

Plaintiffs correctly argue there can be no fraud without a false representation. *Id*.; *Hord v Environmental Research Inst (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000). Further, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). But defendants rely on a recognized exception that "an unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." *Foreman, supra* at 143, citing *Rutan v Straehly*, 289 Mich 341, 348-349; 286 NW 639 (1939); see, also, *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930).

Plaintiffs' main argument is that all plaintiffs may not be found liable for any fraud that Sheldon alone perpetrated. Plaintiffs assert defendants presented no evidence at trial that Gale, Shauna, or Ashley made a false statement on which Lenchner or his companies reasonably relied. This argument fails for several reasons. Defendants' theorized that all Korns and KFLP were acting in concert to loot defendant companies for personal benefit. In *Kefuss v Whitley*, 220 Mich 67; 189 NW 76 (1922), the plaintiff alleged that several people including Whitley and Davey defrauded him. The Court opined:

> Where there is evidence that parties are acting in collusion, "Everything said, done, or written by any one of the parties to the combination, in furtherance of the common purpose, is deemed the act of all." *Gumberg* v *Treusch,* 103 Mich 543, 554. In my opinion, the fair inference to be drawn from the proofs is that Mr. Davey knew all about the deal with plaintiff and, having accepted the fruit of the fraud, he may not complain of a decree which so far as possible places the parties *in statu quo.* [*Kefuss*, *supra* at 88-89.]

Plaintiffs argue that defendants' concert of action theory is unavailable because defendants voluntarily dismissed separate independent claims of civil conspiracy. Although both defendants and plaintiffs dismissed their civil conspiracy claims before sending the case to the jury, this argument is unavailing. The *Kefuss* concert of action theory does not depend on proving an independent claim of civil conspiracy. It requires evidence that parties knowingly acted to further a common purpose, in this case, to siphon company assets for the Korn family's personal use and benefit. Here, there was evidence from which the jury could infer all Korns knowingly participated in a common fraudulent scheme. There was testimony from Sheldon, Gale, and Shauna from which the jury could infer that the Korn family operated as a unit in its business dealings regarding the Lenchner companies. Further, there was testimony from which the jury could infer that Sheldon, Gale and Shauna participated in the fraudulent scheme. For example, there was evidence that Sheldon wrote checks to Gale for hundreds of thousands of dollars on company accounts, that Gale deposited the funds into KFLP (comprised of all Korn family members), and from which all family members could freely draw funds.

Moreover, for the reasons discussed more fully in part IV, plaintiffs affirmatively waived any claim of error regarding a severable determination of liability as to each plaintiff. Here, because of the "and/or" verdict form that all parties agreed to submit to the jury, even if only Sheldon were liable for fraud, the verdict should be upheld.

Next, plaintiffs argue that defendants offered evidence at trial on a fraud theory that had not been alleged in their counter-complaint. Specifically, defendants offered evidence that Sheldon agreed to act like a partner but did not; this induced Lenchner to fund the companies that the Korns looted. Plaintiffs' claim of prejudice by lack of notice is without merit. The very essence of plaintiffs' claims against defendants was that Sheldon and Gale Korn were 50-50 partners with Lenchner in the various real estate development companies. Lenchner denied the Korns were partners. Defendants' pleadings stated that the Korns "engaged in a practice and course of conduct that operated as a fraud and a deceit on the Lenchner entities." Thus, defendants' theory of fraud was within the broad framework of the issues raised by both parties' pleadings, and, indeed, went to the heart of the case: was there a partnership or was a fraud perpetrated? Plaintiffs were not prejudiced by lack of notice.

Moreover, it was during the Korns' counsel's cross-examination of Lenchner that testimony was elicited that established the fraud theory that Sheldon agreed to act like a partner but did not. MCR 2.118(C)(1) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings." So if the pleadings were not broad enough to include this theory of fraud, the record supports finding it was tried by implied consent of the parties. That defendants did not move to amend their counterclaim is of no moment because (1) when issues are tried by implied consent of the parties they "are treated as if they had been raised by the pleadings" and (2) an

"amendment of the pleadings to conform to the evidence . . . may be made on motion of a party at any time, even after judgment." MCR 2.118(C)(1).

Next, plaintiffs contend this theory will not support a judgment of fraud because it was a promise only actionable for breach of contract, not fraud. Plaintiffs are correct that in general, "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co*, *supra* at 336. But "an unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." *Foreman*, *supra* at 143. Here, the jury could have reasonably found that Sheldon's promise to fully participate in a partnership by contributing capital and agreeing to personally be responsible for company debts, as Lenchner was, induced Lenchner to continue funding the companies from which the Korns siphoned funds for the personal benefit of all Korns. More important, the jury could reasonably have determined from the evidence that Sheldon never intended to fulfill his promise, intended Lenchner to rely and act on it, and that Lenchner and his companies reasonably relied on the false promise and were thereby defrauded.

Finally, plaintiffs argue that defendants' theory of fraud cannot sustain a judgment against all plaintiffs other than Sheldon because there was no proof of agency between Sheldon and the other plaintiffs. Further, plaintiffs argue, even if Sheldon were the agent of the other plaintiffs, there was no evidence Sheldon's actions were within the scope of the agency. But as discussed *supra*, and more fully in part III (A), defendants' theory of the case was not agency; rather, defendants posited that the Korns acted in concert to perpetrate a common fraudulent scheme. Evidence was presented at trial that supported defendants' theory of the case and on which reasonable people could disagree. Thus, the trial court properly denied plaintiffs' motions for directed verdict and JNOV with respect to defendants' counterclaim of fraud and misrepresentation. *Foreman*, *supra* at 135-136.

B

Michigan recognizes a cause of action for silent fraud. *Lumber Village, Inc v Seigler*, 135 Mich App 685, 699-670; 355 NW2d 654 (1984), citing *United States Fidelity & Guaranty Co v Black*, 412 Mich 99; 313 NW2d 77 (1981). "[T]o establish a claim of silent fraud, there must be evidence . . . [of] some sort of representation that was false." *McConkey*, *supra* at 25. But, "[a] misrepresentation need not necessarily be words alone, but can be shown where the party, if duty-bound to disclose, intentionally suppresses material facts to create a false impression to the other party." *Id*. Thus, "in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure." *Id.* at 31, citing *Black*, *supra* at 125, 127. Where a duty of disclosure exists, a party's action or conduct "can be actionable as silent fraud if that action or conduct is intended to create a misimpression to the opposing party." *McConkey*, *supra* at 33. Silent fraud, like other forms of fraud, also requires a plaintiff to establish reliance on the false or misleading impression created by the non-disclosure. *Lumber Village*, *supra* at 700.

From the evidence presented at trial, the jury could have found that a fiduciary relationship existed between defendants and Sheldon and Gale Korn with respect to the operation of the defendant companies' Northern Michigan real estate business operations. Further, the jury could reasonably have concluded from the evidence that Sheldon and Gale created a false

impression that company checks written to Gale on business accounts were for reimbursement of business expenses. Likewise, the jury could well have found that the Korns created a false impression that other purchases and payments made on business accounts were for business purposes. Further, there was evidence that promises were made, especially by Sheldon, that questionable company expenditures would be documented and accounted for as business expenses. And, the jury could easily have concluded from the evidence that Gale and Sheldon Korn never intended to account for their expenditure of company money but instead intended to suppress the true nature of the expenditures. Finally, the jury could reasonably have concluded that Lenchner reasonably relied on the false impression created by the Korns, so he continued funding the companies, and as a result, sustained over a million dollars in damages.[3] Because reasonable people could disagree regarding the import of the evidence at trial, the trial court did not err in denying plaintiffs' motion for directed verdict and JNOV. *Foreman*, *supra* at 135-136.

Plaintiffs' argument that the silent fraud verdict is unsustainable against all plaintiffs fails for the same reasons as discussed in subpart A. Further, plaintiffs' argument that the Korns' expenditure of company funds could have been to reimburse business expenses, or loans, or capital draws that were merely reclassified after the fact as "theft losses" merely reinforces the conclusion that questions of fact were presented at trial for the jury to resolve. Hence, the trial court properly denied plaintiffs' motions for direct verdict and JNOV. *Id*.

II

Next, plaintiffs argue that the verdict against Gale for breach fiduciary duty must be set aside because no evidence showed defendants relied on Gale's advice and judgment. We disagree.

The evidence at trial established that Gale Korn received numerous substantial checks written by both Sheldon and Lenchner ostensibly for business purposes on company accounts. From financial records presented at trial and the testimony of defendants' financial expert, reasonable jurors could have concluded that Gale did not properly account for the company funds entrusted to her. Indeed, the jury could have found that Gale was a key participant in a scheme to divert company funds to KFLP for the use and personal benefit of the Korn family.

Moreover, plaintiffs agreed to submit this claim and the rest of defendants' counter-claims to the jury on the basis that liability could be imposed if either Gale Korn or Sheldon Korn breached a fiduciary duty owed to defendants. As discussed in part IV, plaintiffs waived any claim of error regarding the "and/or" verdict forms all parties agreed to submit to the jury.

III

Next, defendants argue that the trial court erred by (A) not sua sponte instructing the jury regarding the law of principal and agent, and (B) instructing the jury it could award exemplary

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[3] Defendants' financial expert testified that company records reflected $1,418,451.49 in undocumented expenditures by the Korns.

damages because they are not permitted where economic damages are sought. Plaintiffs forfeited the first claim and waived the second; manifest injustice did not result.

This court reviews claims of instructional error de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). MCR 2.516 governs jury instruction procedure in civil cases. MCR 2.516(C) provides:

> A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

Thus, to preserve an alleged error regarding jury instructions for appeal, a party must request the instruction before deliberations begin or must object to the instructions given within the same timeframe. *Id*.; *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). "This Court will review an unpreserved issue concerning an error in jury instruction only when necessary to prevent manifest injustice. Manifest injustice results where the defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case." *Mina v General Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866; 568 NW2d 80 (1997) (citations omitted).

In some circumstances, a party may waive alleged instructional error. A waiver is an intentional relinquishment or abandonment of a known right. *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006), citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.'" *Carter*, *supra* at 215 (citation omitted). Moreover, a party that expressly agrees with an issue in the trial court cannot then take a contrary position on appeal. *Grant*, *supra* at 148. In the context of a jury instruction, when a party agrees with the trial court's instructions as given, the party is not entitled to relief regarding the instruction on appeal. *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 591; 657 NW2d 804 (2002).

A

The record discloses that plaintiffs had more than ample opportunity to request jury instructions and object to the instructions that the trial court actually read. Plaintiffs filed requests for jury instructions with the court some six months before trial. After the parties had rested their cases and the trial court decided the parties' motions before arguments, the court and counsel turned their attention to proposed jury instructions. Plaintiffs counsel indicated that "we . . . need a minute to discuss them." The essence of the colloquy between the court and counsel was that the parties' counsel needed a moment to put the final instructions in a form that could be copied to submit to the jury. The trial court then stated, "Let's take a break, and you can see what you can clean up between the two of you so that we'll spend less time in chambers. Let me know when you're ready." *Id*. The court was then in recess for over an hour, after which

plaintiffs' counsel delivered his closing argument. The trial was then adjourned to the next day with the jury to return the next morning at 9:00 A.M.

The next morning at 9:43 a.m., the trial court opened the record by assuring the jury that "we were all working diligently." The court's comment clearly suggests to seasoned trial lawyers that counsel and the court were addressing last minute concerns with jury instructions or verdict forms. Defendants' counsel then delivered his closing argument, and plaintiffs' counsel presented his rebuttal. At the close of rebuttal, and after a 14-minute recess, the trial court began reading the final jury instructions. During the course of instructing the jury, defense counsel requested and was granted a bench conference. After the court's charge was completed, the bailiff sworn, and the jury excused, the trial court asked counsel, "anything further for the record?" Counsel for both sides indicated there was nothing. This record supports defendants' contention that both parties' counsel met with the trial court in chambers and agreed on jury instructions. At a minimum, the record establishes plaintiffs' counsel had ample opportunity to object but did not. So, alleged instructional was not preserved. MCR 2.516(C).

With respect to the merits of plaintiffs' claim that the trial court should have instructed the jury regarding agency, plaintiffs mischaracterize defendants' argument. Defendants did not argue that Sheldon acted as the agent of the other Korn family members. Rather, defendants argued that the evidence supported the finding that all plaintiffs knowingly acted in concert to perpetrate a common fraudulent scheme. See *Kefuss*, *supra*. On this basis, defendants contend that all Korns are bound by Sheldon's deeds and words in carrying out the common fraudulent scheme.

Defendants' theory of the case was not the same as the issue involved in *Smith-Douglas v Walch*, 391 Mich 201; 215 NW2d 142 (1974), on which defendants rely. In that case, the question at trial was whether a buyer who bought from a retailer could be liable to the manufacturer on the basis that the retailer was acting as the manufacturer's agent. The *Smith-Douglas* Court held that agency was "the controlling legal issue supported by the testimony presented to the jury" and because no instruction was given, a new trial was required. *Id*. at 203-204. Whether the other plaintiffs authorized certain actions by Sheldon is not the same question as whether all plaintiffs, including Sheldon, were participating in a common fraudulent scheme. The distinction is perhaps subtle, but real. Compare MRE 801(d)(2)(D) & (E). While both sides dismissed independent tort claims of civil conspiracy before submitting the case to the jury, this did not lessen the principle of *Kefuss* regarding joint liability of codefendants for each others' acts (in this case co-plaintiffs) when engaged in a common fraudulent scheme. In sum, the legal rules pertaining to principal and agent were not basic and controlling in this case. Consequently, manifest injustice did not result from the failure to instruct the jury on agency principles. *Mina*, *supra* at 680-681. Plaintiffs' claims on this issue fail.

B

Plaintiffs waived any error regarding the trial court's instruction regarding exemplary damages. Plaintiffs' counsel acknowledged during post-trial motions that all parties had agreed to the verdict forms submitted to the jury. Indeed, each party submitted claims against the other for exemplary damages, and mirror verdict forms were submitted to the jury with respect to plaintiffs' claims against defendants and defendants' claims against plaintiffs. As noted, plaintiffs' counsel specifically approved the verdict forms. The trial court read its instruction

regarding exemplary damages to apply equally to the parties' claims against each other. Thus, the record indicates that plaintiffs' counsel affirmatively agreed with the trial court's instruction regarding exemplary damages. Plaintiffs have waived this alleged instructional error. *Chastain, supra* at 591. "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant, supra* at 148. Even if forfeited, defendants present a persuasive argument that the claims and evidence in this case would support an award of exemplary damages. *Veselenak v Smith*, 414 Mich 567, 573-575; 327 NW 261 (1982); *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999). Thus, manifest injustice did not result. *Mina, supra* at 680-681.

IV

Plaintiffs next argue that the trial court committed plain error by not instructing the jury with M Civ JI 41.01[4] and M Civ JI 41.02.[5] This error, plaintiffs argue, was compounded by the "and/or" verdict form used here and resulted in manifest injustice. We disagree and again conclude that plaintiffs have waived any error.

A waiver is an intentional relinquishment or abandonment of a known right. *Grant, supra* at 148, citing *Carter, supra* at 215. Here, plaintiffs' counsel included M Civ JI 41.01 and M Civ JI 41.02 in requested jury instructions submitted to the trial court well in advance of trial. So plaintiffs' counsel was clearly aware of these instructions. Also, the record clearly shows plaintiffs' counsel affirmatively agreed to use the incompatible "and/or" verdict form. Thus, the record reflects that although aware of M Civ JI 41.01 and M Civ JI 41.02, plaintiffs' counsel abandoned his request for those instructions and also affirmatively approved the "and/or" verdict format. An abandonment of a known right constitutes a waiver. *Grant, supra* at 148. "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.'" *Carter, supra* at 215 (citation omitted). "A party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant, supra* at 148. Accordingly, plaintiffs are not entitled to relief on this issue. *Chastain, supra* at 591.

V

Next, plaintiffs contend exemplary damages were in excess of actual damages and are not recoverable as a matter of law. Further, plaintiffs argue the "and/or" verdict form permitted the

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[4] M Civ JI 41.01 (Two or More Defendants - Separate Consideration - Repeating Instructions) provides: "There are *[number]* defendants in this trial. Each defendant is entitled to separate consideration of [his / or / her] own defense. I shall not repeat my instructions for each defendant. Unless I tell you otherwise, all instructions apply to each defendant."

[5] M Civ JI 41.02 (Damages Where There Is No Allocation of Fault Between Defendants) provides: "If you find one of the defendants to be liable, you shall determine the amount of damages [he / or / she] caused and return a verdict in that amount. If you find more than one of the defendants to be liable, you shall return a separate verdict for the amount of damages you determine each defendant caused."

jury to award exemplary damages without finding the requisite malicious, willful, and wanton conduct. Finally, plaintiffs contend the evidence did not support awarding exemplary damages against Gale, Shauna, Ashley and KFLP. We conclude plaintiffs' arguments do not merit relief.

Exemplary damages may be awarded in intentional tort cases, including fraud, where they compensate for injured feelings even though compensation is also awarded for economic loss. "As a practical matter, the conduct we have found sufficient to justify the award of exemplary damages has occurred in the context of the intentional torts, slander, libel, deceit, seduction, and other intentional (but malicious) acts." *Veselenak, supra* at 575.

Plaintiffs' argument that the trial court's instruction permitted awarding exemplary damages in excess of defendants' "whole" injury fails. First, as discussed already, plaintiffs at a minimum forfeited, if they did not, in fact, waive, alleged error regarding the jury instructions. Second, jury instructions must be read as a whole and not piecemeal. *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 424; 653 NW2d 415 (2002). Here, the court instructed the jury, "You may add to the award of actual damages an amount you agree is proper as exemplary damages." Read in the context of the court's entire charge, "actual damages" patently refers to amounts the jury might have awarded as economic damages on claims of fraud, silent fraud, breach of fiduciary duty, and so forth. Although "actual damages" may now include both economic and non-economic damages, historically "actual damages" were synonymous with only economic damages. See *Veselenak, supra* at 573-574. Nonetheless, the court's charge read as a whole did not permit double recovery or more compensation than the injuries defendants suffered.

Finally, plaintiffs apparently concede by not arguing to the contrary that the evidence at trial supported an award of exemplary damages against Sheldon. Because plaintiffs waived any error regarding the "and/or" verdict form and a determination of each individual plaintiff's liability, plaintiffs' argument regarding exemplary damages fails.

VI

Finally, plaintiffs argue that the trial court erred in not granting their motion for remittitur or new trial because the jury verdicts were excessive with respect to Gale, Shauna, Ashley and KFLP. Again, we find plaintiffs' arguments do not merit relief.

When a jury awards damages that appear excessive because of the influence of passion or prejudice, or the jury award is clearly or grossly excessive, a court may grant a new trial. MCR 2.611(A)(1)(c)-(d). Alternatively, a trial court may offer the prevailing party an opportunity to consent to judgment in the highest amount the court finds is supported by the evidence. MCR 2.611(E)(1). This Court reviews a trial court's decision regarding a motion for remittitur or new trial for an abuse of discretion. *Grace v Grace*, 253 Mich App 357, 367; 655 NW2d 595 (2002). An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes. *McManamon v Redford Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). This Court must view the evidence in the light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). The trial court, having witnessed the testimony and the evidence as well as the jury's reactions, is in the best position to evaluate the credibility of the witnesses and make an informed decision. Consequently, we must accord due deference to the trial court's decision. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995). Moreover, as pertinent here, a verdict should not be

set aside merely because the method the jury used to compute damages cannot be determined. *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005).

In this case, after ruling that defendants waived any issues regarding the "and/or" verdict forms by approving them, the trial court denied defendants' motion for JNOV, or remittitur, or new trial by reasoning as follows:

> And it was also my impression, based upon Sheldon Korn's testimony primarily, that he was emphatic that it was a family unit that operated through the family, Korn Family Trust. And I think he explained why to a certain extent and that he was avoiding a judgment creditor. But he was emphatic that he involved the whole family equally in this entire business relationship.
>
> And so there was some evidence at least to raise an issue. The jury has made its decision, and the Court will not set that decision aside, will not grant the motion for remittitur and will not grant the motion for a new trial.

Plaintiffs' arguments that the trial court abused its discretion lack merit. First, for the reasons already discussed, plaintiffs waived any claim of error that an assessment of liability as to each individual plaintiff was not made.

Second, for the reasons discussed in parts III (B) & V, the award of exemplary damages did not render the verdicts excessive by awarding more than defendants' economic and non-economic damages.

Third, plaintiffs' argument that the methodology of defendants' expert witness, Janice Smolinski, was suspect does not support finding the verdict excessive. Although, perhaps, defendants could have argued that Smolinski's testimony should not have been admitted under MRE 702, they did not raise such a claim in their questions presented on appeal, so it has been waived. MCR 7.212(C)(5); *Hammack v Lutheran Social Services*, 211 Mich App 1, 7; 535 NW2d 215 (1995). The only other argument that Smolinski's testimony might affect pertains to whether remittitur or new trial should have been granted. That is, the trial court in deciding the motion for remittitur or new trial should have concluded that Smolinski's testimony was not credible or not deserving of any weight. This argument is meritless because in deciding a motion for remittitur or new trial, the court must view the evidence in the light most favorable to the nonmoving party. *Wiley*, *supra* at 499.

Plaintiffs' remaining arguments also fails. That Ashley or Shauna, from plaintiffs' perspective of the evidence, only received limited personal financial benefits from defendant companies is immaterial to the assessment of the damages defendants sustained. The only verdict that is based on benefits plaintiffs received is that for unjust enrichment. Because plaintiffs waived an individual assessment of damages as to each plaintiff, this argument cannot be grounds for concluding the verdicts were excessive.

Plaintiffs present the same agency argument regarding KFLP that we found lacked merit in Part III (A). As discussed already, plaintiffs mischaracterize defendants' argument. Defendants did not argue that Sheldon acted as the agent for KFLP. They claimed that that the evidence supported finding that all plaintiffs knowingly acted in concert to perpetrate a common

fraudulent scheme. The evidence supports defendants' theory of the case that all Korns participated in a fraudulent scheme of siphoning assets from the defendant companies and funnel those assets through KFLP for the use and personal benefit of all Korns.

Defendants' arguments with respect to Gale fail for the same reasons discussed in part II. From the evidence presented at trial, the jury could have found that Gale was a key participant in a scheme to divert company funds to KFLP for the use and personal benefit of the Korn family. As discussed in part IV, plaintiffs waived any claim of error regarding the "and/or" verdict forms all parties agreed to submit to the jury.

Plaintiffs lament that this litigation should have been handled more amicably as a simple accounting process. Aside from there being no basis for finding that the verdicts were excessive, plaintiffs ignore the reality of this litigation. Plaintiffs initiated this litigation, and all parties chose to submit their respective claims to a jury. Plaintiffs clearly "rolled the dice" and lost. Either here or at the trial court level, they have failed to demonstrate a meritorious reason for now granting them a new trial.

According due deference to the trial court because it witnessed the testimony and was in the best position to evaluate witness credibility and thus make an informed decision whether the evidence supported the jury verdicts, *Phillips, supra* at 404, we conclude that plaintiffs have not shown that the trial court's decision denying their motion for remittitur or new trial was an abuse of discretion. *McManamon, supra* at 138; *Grace, supra* at 367.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski